JAMES R. [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 655

BEACHVIEW BROADCASTING CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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In the opinion below, the Court of Appeals did not merely declare that it could "find nothing arbitrary, capricious, irrational or unreasonable" in the Commission's statements of its reasoning upon the topics of comparison which it considered. (App. 185a). The Court of Appeals went further, in adverting to the limited scope of its review, to disclose that it reached its conclusion because the findings and decision of the Commission complied with the following requirements of *Johnston Broadcasting Co. v. Federal Communications Commission*, 85 U.S. App. D.C. 40, 46, 175 F. 2d 351, 357 (1949):

> "In respect to comparative decisions, these are the essentials: (1) The bases or reasons for the final

conclusion must be clearly stated. (2) That conclusion must be a rational result from the findings of ultimate facts, and those findings must be sufficient in number and substance to support the conclusion. (3) The ultimate facts as found must appear as rational inferences from the findings of basic facts. (4) The findings of the basic facts must be supported by substantial evidence. (5) Findings must be made in respect to every difference, except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant."

The significance of the opinion is that it requires only that the Commission's decision touch base upon the substantial facts adduced, and be *internally* consistent in drawing its conclusions from these findings; it divorces the Commission's decision from the *external* statutory standard which is to govern its determinations. Entire, self-contained mathematical systems can be constructed, we know, by revising or rejecting a single axiom, that parallel lines meet at infinity, or that a straight line is the short distance between two points. It was never intended, however, that the Commission was to be free to pick and choose among the postulates which it would apply to a particular case; the Commission's world must remain Euclidean, bounded by the ultimate legislative criterion of the public interest, convenience, or necessity. The judicial function is not performed unless the reviewing court determines "whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action." *Federal*

Radio Commission v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276 (1933).

That the Court of Appeals, on limited occasions, has exercised its powers of review to reverse a Commission decision for an incorrect application of comparative criteria is all the more reason why it should not have refused to exercise its authority in this case. In *Sunbeam Television Corporation* v. *Federal Communications Commission*, 100 U.S. App. D.C. 82, 84, 243 F. 2d 26, 28 (1957), the Court of Appeals held that it was error for the Commission to depart from its established policy that it is desirable for local television stations and network organizations to be independent of each other; in the instant case, the Court of Appeals has disclaimed any authority to examine into the Commission's established policy with respect to such matters as integration, diversification, and civic participation. Significantly, in the other two cases also cited by respondent as examples of the exercise of judicial review, *W. S. Butterfield Theatres, Inc.* v. *Federal Communications Commission*, 99 U.S. App. D.C. 71, 237 F. 2d 552 (1956) and *WLOX Broadcasting Company* v. *Federal Communications Commission*, — U.S. App. D.C. —, 260 F. 2d 712 (1958), the majority opinions of the Court of Appeals were written, respectively, by Circuit Judge Bazelon and Circuit Judge Miller, both of whom voted to grant the petition for rehearing en banc before the Court of Appeals in this case.

By no means does petitioner aver that the Commission is bound "to deal with all cases at all times as it has dealt with some that seem comparable." *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 228 (1946) (which was not a case involving a comparative proceeding, but one which upheld the right of the Commission to take more drastic action

than that theretofore exercised in refusing to renew an applicant's license because of deceptive misstatements). Petitioner does maintain, however, that there must be some irreducible element of consistency and predictability in Commission decisions—it is only a *foolish* consistency which is the hobgoblin of little minds—that a distinction must be drawn by the reviewing court between changes in the Commission's factors of decision representing a growth and evolution of expertise, with some discernable pattern of orderly concepts, and changes in criteria by erratic, wildly fluctuating factors "good for this trip only"; and that a legislative standard which would permit a regulatory agency under any set of facts to reach any preconceived result would be no standard at all.

If other Commission decisions where a criterion has been given a particular meaning or weight are distinguishable, the Court of Appeals should require, in the exercise of its judicial function, that the changes in specification or application be justified by the Commission in the light of the public interest. If, in the situation posited by respondent (Opp. p. 6), "the Commission's view as to the weight to be given particular factors may legitimately change as, for example, where conditions in the broadcasting industry have changed," then the circumstances should be set forth by the Commission to enable the Court to determine whether the changed criterion has become more consonant with the public interest.

The state of communications law is such that this Court, which has not heretofore given direction to the scope of judicial review in comparative proceedings, must now intervene. In *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 490 (1951), this Court had occasion to state:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Court of Appeals."

Similarly, it has become necessary that this Court definitize the relationship between the Federal regulatory agencies and statutory courts of review in requiring adherence of the administrative body to the statutory standard and the Rule of Law.

For the foregoing reasons, in addition to those heretofore urged in the petition for writ of certiorari, it is respectfully submitted that said petition for writ of certiorari should be granted.

Respectfully submitted,

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